No. 75-661

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

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Assistant Attorney General,

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Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 4, 1975. On Sep-

tember 28, 1975, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in legislating with regard to criminal offenses committed in Indian country, Congress may, consistent with requirements of equal protection of the law, assert federal jurisdiction only with respect to offenses in which an Indian is involved either as accused or as victim, leaving to the States the prosecution of offenses entirely involving non-Indians (under laws that may differ from and in some particulars be more or less lenient than federal law).

2. Whether, if the preceding question is answered in the negative, 18 U.S.C. 1152 should be construed to assert federal jurisdiction over wholly non-Indian offenses, thereby eliminating the possibility of disparate treatment based upon the status of the accused.

STATUTES INVOLVED

18 U.S.C. 1152 provides in pertinent part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> * * * * *

18 U.S.C. 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.
>
> As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. 1111 provides in pertinent part:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or

any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Idaho Code § 18-4001 (1948) provides:

Murder defined.—Murder is the unlawful killing of a human being with malice aforethought.

Idaho Code § 18-4003 (1974 Cum. Supp.) provides:

Degrees of murder.—All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 1, p. 588.]

Idaho Code § 18-4004 (1974 Cum. Supp.) provides:

Punishment for murder.—Every person guilty of murder in the first degree shall suffer death.

Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten (10) years and the imprisonment may extend to life. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 2, p. 588.]

STATEMENT

In February of 1974, four men broke into Emma Johnson's house, which was within the boundaries of the Coeur d'Alene Indian Reservation in Idaho (within "Indian country" as defined by 18 U.S.C. 1151), and robbed her and killed her by beating her to death (App. A, *infra*, pp. 1a-3a). Because the crimes involved Indians (here, the accused) and occurred in Indian country, they were within the jurisdiction of the federal district court. A federal grand jury returned an indictment against the respondents—Gabriel Antelope, Leonard Davison, and William Davison—and co-defendant Norbert Seyler. Count I of the indictment charged that Leonard Davison and Gabriel Antelope, enrolled Coeur d'Alene Indians, feloniously entered the house of Emma Johnson, a non-Indian, with the purpose to commit robbery. Count II charged that they forcefully took from her a purse of money belonging to her. Count III charged that they, with William Davison and Norbert Seyler, also enrolled Coeur d'Alene Indians, "with malice aforethought and in the perpetration of the robbery alleged in Count Two hereof, unlawfully and

wilfully did kill Emma Teresa Johnson * * * by beating [her] * * * with their fists and feet."

The defendants pleaded not guilty. Seyler was granted immunity and testified at trial for the government. After a jury trial in the United States District Court for the District of Idaho, respondents Antelope and Leonard Davison were convicted on all three counts, including first degree murder under Count III. William Davison was convicted solely of second degree murder under Count III (App. A, *infra*, pp. 2a-3a). After pre-sentence investigations, Antelope was sentenced to 15 years' imprisonment on each of Counts I and II and to life imprisonment on Count III, the sentences to run consecutively. Leonard Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act (18 U.S.C. 5010) for concurrent terms of 15 years on each of Counts I and II and for life on Count III. William Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act for 12 years.

The court of appeals reversed the convictions of murder. It noted that because the victim was a non-Indian, the accused, had they too been non-Indians, would not have been tried in federal court under federal law but would instead have been tried and punished under Idaho law (App. A, *infra*, p. 4a). Under Idaho law, a defendant may be convicted of first degree murder only upon proof of premeditation and deliberation concerning the murder (Idaho Code § 18-4003 (1974 Cum. Supp.)); under the applicable

federal statutes (18 U.S.C. 1153 and 1111) and the instructions to the jury in this case, however, it is possible that respondents Antelope and Leonard Davison were convicted of first degree murder on proof of killing with malice aforethought committed in the course of a robbery, even though the jury may not have found premeditation.

The court of appeals concluded that "the *sole* basis for the disparate treatment of appellants and non-Indians is that of race" (App. A, *infra*, p. 6a; emphasis in original) and held that the defendants, by being tried under federal law rather than state law, were "put at a serious racially-based disadvantage" (*id.* at 14a) that could not be justified under the government's wardship over Indians and that violated the equal protection concept implicit in the due process clause of the Fifth Amendment. The court thus held the murder provision of 18 U.S.C. 1153 unconstitutional as applied in this case. The court cautioned that it was not holding the felony murder provision of 18 U.S.C. 1111 unconstitutional (App. A, *infra*, p. 15a), but that "Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians" (*id.* at 14a).[1]

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[1] Since respondent William Davison was convicted only of second degree murder, the elements of which appear to be identical under federal and Idaho law (both 18 U.S.C. 1111 and Idaho Code §§ 18-4001, 18-4003, define second degree murder as "the unlawful killing of a human being with malice aforethought"), no reason appears in the decision of the court of appeals for reversing his conviction. Nevertheless, this ap-

REASONS FOR GRANTING THE WRIT

The essence of the holding of the court of appeals in this case is that Congress may not choose to limit the exercise of federal jurisdiction and the application of federal law to crimes committed within Indian country involving an Indian either as victim or as accused, leaving jurisdiction over wholly non-Indian cases to the States, without running seriously afoul of equal protection concepts embodied in the Fifth Amendment. The court's decision injects grave uncertainties and threatens substantial practical disruption in the enforcement of criminal sanctions, in both state and federal courts, for all offenses committed within Indian country whenever the victim is a non-Indian; it does so by requiring the trial of such offenses to be conducted under a patchwork of the most lenient ingredients of state and federal law. Moreover, this costly result has been reached on the basis of what we believe to be an erroneous premise that the instant case reflects an instance of racial discrimination. We submit that the issues presented by this case require resolution by this Court.

1. 18 U.S.C. 1152 and its statutory predecessors (R.S. 2144, 2145, 2146) appear on their face to make federal law applicable to all crimes com-

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parent oversight on the part of the court of appeals presents no question of broad importance for this Court, and our petition as to this respondent is confined to the common grounds raised as to all three respondents.

mitted by non-Indians within Indian country.[2] But this Court over a period of years has held that federal criminal jurisdiction under these statutes does not extend to crimes by non-Indians against non-Indians, even though such offenses occur within Indian country. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496; *Draper* v. *United States*, 164 U.S. 240; *United States* v. *McBratney*, 104 U.S. 621.[3] For such crimes, the State's interest in enforcement of its law as to its citizens was held to overshadow the federal interest in exercising its trust responsibility over tribal Indians and their property. See *United States* v. *McBratney*, *supra*, 104 U.S. at 624. The statutory framework now set forth in 18 U.S.C. 1152 and 18 U.S.C. 1153 as interpreted by this Court, thus applies to any of the listed crimes in which an Indian is either perpetrator or victim, but not to crimes wholly between non-Indians.

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[2] 18 U.S.C. 1153, the Major Crimes Act, provides federal jurisdiction over 13 major crimes when committed by Indians. Other crimes committed by Indians are left to tribal jurisdiction (see *Keeble* v. *United States*, 412 U.S. 205, 209-212), except for federal crimes not dependent on the territorial jurisdiction of the United States (see *Head* v. *Hunter*, 141 F. 2d 449 (C.A. 10); *Walks on Top* v. *United States*, 372 F. 2d 422 (C.A. 9), certiorari denied, 389 U.S. 879).

[3] These decisions were based primarily on the analysis of the statutes involved, including the enabling acts of the States involved in *Draper* and *McBratney*. The cases do not appear to erect any constitutional barrier to an exercise of federal jurisdiction over crimes entirely involving non-Indians, if such crimes are committed on Indian reservations or otherwise within Indian country, as defined by 18 U.S.C. 1151.

If it is accepted, as indeed this Court has held, that the line between state and federal jurisdiction over crimes occurring on an Indian reservation is properly drawn on the basis of whether an Indian is in any way involved (but see point 3, *infra*) then, in our view, it follows that Congress need not define crimes within its sphere of jurisdiction in a fashion conforming to the definition of similar crimes by the various States within their spheres of jurisdiction. The court of appeals decision to the contrary creates the anomaly that although Congress may legislate as to crimes involving Indians, whether as perpetrator or victim, its legislation is not supreme but must be conformed to, or at least must be no more "harsh" than, the equivalent state legislation. But the Constitution clearly provides for congressional authority over Indian affairs,[4] and, of course, it also provides that the law and treaties made by Congress under the Constitution "shall be the superme Law of the Land" (Art. VI, cl. 2).[5]

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[4] For an exposition of the constitutional basis of federal jurisdiction over Indian affairs, see *Morton* v. *Mancari*, 417 U.S. 535, 551-553.

[5] Conversely, by parity of reasoning, it would seem difficult, if the court of appeals is correct, to sustain the application by state courts (to non-Indians charged with crimes against other non-Indians in Indian country) of those provisions of state law that are more harsh than the federal provisions that would apply were the accused an Indian. Thus, the decision also threatens the impairment of state sovereignty in an area that, by legislation of Congress as construed by this Court, has been left to state jurisdiction.

Properly analyzed, the sole legally significant "discrimination" that must be justified to support the congressional scheme is the statutory election (actually created by decisions of this Court) to eschew jurisdiction over wholly non-Indian offenses while asserting federal jurisdiction and applying federal law to all other offenses occurring in Indian country. It is, of course, inherent in such a division of jurisdiction that the controlling substantive and procedural law will vary in numerous particulars between the two systems, since they are being ordained by different sovereigns as parts of independent regulatory structures. In light of the special, constitutionally provided responsibilities of Congress with respect to matters involving Indians, considered in conjunction with the natural interest of the States in regulating relations among their non-Indian citizens, the historic jurisdictional "discrimination" is entirely reasonable, and the inherent disparities thereby created are not subject to proper constitutional attack on equal protection grounds.

Moreover, the supposed "racial discrimination" on which the court of appeals based its decision does not exist. Properly analyzed, legislation affecting Indians and Indian country is not essentially racial. The separate treatment of Indian affairs, as this Court has noted, grows out of the former independence of the Tribes and their conquest by the United States, which then assumed a trust responsibility for them. This is not a question of race, but of political recognition. A person can cease to be an Indian in the

eyes of the law by severing his relationship with a federally recognized tribe. Similarly, persons who are racially pure-blooded Indians are not so for legal purposes if they are members of Canadian or South American tribes or of North American tribes terminated by Act of Congress. See *Morton* v. *Mancari*, *supra*, 417 U.S. at 551-555 (particularly p. 553, n. 24). Any such person accused of an offense such as that in the instant case, although racially an Indian, would have been tried by Idaho courts under Idaho law.

Equally important, in the context of this case, every defendant, whether Indian or non-Indian, tried for murder *under federal Indian country jurisdiction* is equally subject to the provisions of 18 U.S.C. 1111 (compare 18 U.S.C. 1152 with 18 U.S.C. 1153, both of which, in respect to homicide, refer to federal enclave law, *i.e.*, Section 1111, for murder). It is only when both the accused and the victim are non-Indians that a different result may obtain. But this is not because of racial discrimination for or against Indians, but on account of the recognition, in accordance with decisions of this Court, that state jurisdiction, rather than federal, governs the crime.

This Court's decision in *Keeble* v. *United States*, 412 U.S. 205, and the Ninth Circuit's prior decision in *United States* v. *Cleveland*, 503 F.2d 1067, both relied upon by the court below, are not to the contrary. In *Keeble*, the Court was concerned with whether 18 U.S.C. 1153 (the Major Crimes Act), which extends federal court jurisdiction to 13 major

crimes committed by Indians on Indian reservations, permitted federal rather than tribal jurisdiction over lesser included offenses and thus in appropriate circumstances required instructions as to lesser included offenses once the federal court had assumed jurisdiction over the major offense listed in the act. The case concerned an Indian charged with killing another Indian. In considering the question, the Court pointed to the government's concession that a non-Indian committing the same offense on the reservation would have been entitled to the instruction (412 U.S. at 208-209). But the comparison was of crimes both of which would have been under federal Indian country jurisdiction. The focus in *Keeble* thus was on the situation in which federal jurisdiction was being exercised in different fashion depending upon the status of the defendant. Nothing in *Keeble* suggests that, so long as federal jurisdiction is exercised in an even-handed manner, the Constitution forces federal law to bow to state law that would apply in cases outside federal jurisdiction.[6]

For much the same reasons, the Ninth Circuit's decision in *United States* v. *Cleveland*, 503 F.2d 1067, does not support the result reached in the instant case. In *Cleveland*, the court held that an amendment to 18 U.S.C. 1153, referring aggravated assaults by Indians to state law for definition of the crime and penalty, was unconstitutional as applied in that case because it subjected the Indian defendant

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[6] Moreover, the Court in *Keeble* engaged in statutory interpretation, not constitutional exegesis.

to more severe penalties than a non-Indian would receive under the reference of 18 U.S.C. 1152 to federal enclave law. But the court in *Cleveland* was concerned with a disparity between the treatment of an Indian defendant and a hypothetical non-Indian defendant both within federal Indian country jurisdiction. Whether or not *Cleveland* is a sound decision, it is no authority for the proposition that the federal jurisdiction exercised in 18 U.S.C. 1152 and 18 U.S.C. 1153, when internally uniform, must also be conformed to state law.

2. A. By removing certainty as to the applicable substantive and procedural law in regard to the most serious crimes whenever the victim is a non-Indian, the decision will have an adverse effect on the already difficult problems of rational and effective law enforcement within Indian country. Heretofore, all homicides, robberies, arson, larceny, and carnal knowledge of junveniles, involving an Indian as accused or victim and committed in Indian country, have been defined and punished under clearly understood federal statutes—*i.e.*, general federal enclave laws that apply to all persons, regardless of race or status, within areas of exclusive federal jurisdiction.[7] This provides certainty in the law applicable to the major offenses.

[7] Several other crimes, either under the Assimilative Crimes Act, 18 U.S.C. 13, or under the second and third paragraphs of 18 U.S.C. 1153, are referred to state law for either definition or punishment.

The court of appeals has now required district judges in homicide cases in Indian country—and presumably in the other major offenses governed by federal substantive law—not to apply the federal statutes as written, but to compare them to the state law in effect at the time and apply a composite rule assuring the Indian defendant the most lenient aspect of each. This exercise, while perhaps superficially attractive, can only lead to uncertainty in an area demanding certainty. Here, for instance, Idaho has recently amended its first degree murder statute to remove the felony murder doctrine but to provide a mandatory death sentence. According to the court of appeals, the district court, rather than applying 18 U.S.C. 1111 as directed by 18 U.S.C. 1153, should have afforded the Indian defendant the benefit of that aspect of the Idaho statute that precludes a felony murder instruction. But must the district court reject other portions of the Idaho statute, specifically the mandatory death sentence? We assume so. But this means that the district court is required to apply a patchwork of legal principles reflecting no coherent system, neither the laws enacted by Congress nor the framework selected by the state legislature.

Furthermore, it seems doubtful that there is any way to confine the impact of the court of appeals' decision within manageable bounds. Its logic, if sound, applies not only to the substantive definition of the offense and the potential punishment upon conviction, but also to the myriad of procedural matters

of potentially critical importance to the outcome of a trial. Differences in liberality of discovery, burden of proof on affirmative defenses, formulation of jury instructions, and similar matters between federal and state systems would give rise to "racial discriminations" equally deserving of the criticism leveled here against the application of federal felony murder principles. For example, if a State imposed upon the defendant the burden of establishing an insanity defense (*e.g.*, *Leland* v. *Oregon*, 343 U.S. 790) but utilized a far more liberal version of the defense than is recognized in federal law, Indians seeking to raise such a defense would presumably have to be afforded the liberal state definition of insanity, while the burden of proof would remain on the prosecution under applicable federal principles (and, presumably, state courts trying non-Indians for crimes in Indian country would have to permit them the boon of the federal burden of proof requirements). Such a result appears manifestly unsatisfactory.

The opportunities for confusion and dispute created by the court of appeals' decision thus appear virtually limitless. Moreover, it will often be impossible for a judge to determine whether the state or the federal statute is more "lenient". For instance, the federal manslaughter statute, 18 U.S.C. 1112, provides only two categories of manslaughter, voluntary and involuntary, and provides imprisonment of not more than ten years for the former and not more than three years and a fine of $1000 for the latter. The Idaho statutes (§§ 18-4006, 18-4007 (1974 Cum.

Supp.)) provide four categories of manslaughter and penalties varying by category, some greater, some less than under the federal statute. An attempt to collate these statutes leads to nothing but confusion.

Last but by no means least, the concept of leniency, if it creates uncertainty of this kind, cannot be equated with "the interest of the Indians." Reservation Indians, like persons in an underprivileged neighborhood of a city, have an interest in effective law enforcement as well as leniency. The complicated comparison in search of leniency required by the opinion below, in our view, is not in the Indian interest.

B. The decision below substantially affects law enforcement in some of the major areas of Indian country in the Nation. The Ninth Circuit includes Arizona, where the major portion of the Navajo Reservation and the entirety of the Hopi Reservation are located, as well as the Fort Apache, San Carlos and Papago Reservations. It also includes the substantial reservations located in the States of Washington and Montana as well as the several smaller reservations of Nevada and Oregon.[8]

The problems created by the decision below are, accordingly, not limited to Idaho. For example, under

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[8] California is unaffected because Public Law 280 makes state criminal law applicable within all the reservations of that State. Act of August 15, 1953, 67 Stat. 588 *et seq.*, 18 U.S.C. 1162; Act of April 11, 1968, 82 Stat. 78 *et seq.*, 25 U.S.C. 1321 *et seq.* The Act also applies to some reservations in Oregon, Washington and Montana.

the Arizona homicide statutes, Ariz. Rev. Stat. §§ 13-451 to 13-463 (1956), the basic definitions of murder in the first and second degrees and manslaughter are similar to those of the federal statutes. Compare, Ariz. Rev. Stat. §§ 13-451, 13-455, 13-456 with 18 U.S.C. 1111 and 18 U.S.C. 1112. The punishments for murder in the second degree and involuntary manslaughter, however, can be more severe under Arizona law than under federal law. Compare Ariz. Rev. Stat. § 13-453(B) with 18 U.S.C. 1111(b); Ariz. Rev. Stat. § 13-457 with 18 U.S.C. 1112(b). Since the state statutes are more severe it might be supposed that the *Antelope* problem could be avoided, at least in its direct application to *federal* prosecutions. But the Arizona statutes also contain detailed provisions on justifiable homicide not found in any federal statute. Ariz. Rev. Stat. § 13-462. In this respect the state statutes are perhaps more forgiving of homicide. In a homicide trial in federal court under Indian country jurisdiction, must the judge incorporate these provisions even if some of them are contrary to federal law? In a homicide trial in state court, where the homicide occurred on an Indian reservation, can the full penalties of Arizona law be imposed? This kind of uncertainty, inherent in the comparison of legal systems, could not have been intended by this Court in holding crimes between non-Indians committed on Indian reservations to be governed under state law.

3. On its face, the first paragraph of 18 U.S.C. 1152 appears to constitute an assertion of federal jurisdiction over all offenses committed in Indian country, regardless of the identity of the accused (the second paragraph carves out certain offenses committed by Indians, but creates no exception for non-Indian defendants). As indicated earlier (pp. 8-9, *supra*), this Court has, in cases such as *McBratney* and *Draper*, construed Section 1152's predecessors as not encompassing wholly non-Indian transactions, even though occurring within a geographical area over which Congress could exercise exclusive jurisdiction. The effect of the holding of the court of appeals has been to render Section 1152 unconstitutional in many of its likely applications. There would, however, be no constitutional problem of the sort perceived by the court of appeals if the statute were read literally to encompass all offenses occurring in Indian country, even those in which no Indian is involved.

Accordingly, if this Court agrees with the court of appeals that the statute as traditionally construed and applied creates serious constitutional problems, we believe it becomes necessary for this Court further to consider the question whether, in order to preserve the constitutionality of the legislative scheme, the applicable statutes should not be construed to reflect an assertion of federal jurisdiction over all offenses, regardless of the identity of accused and victim, committed in Indian country.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-2741

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

GABRIEL FRANCIS ANTELOPE, DEFENDANT-APPELLANT.

No. 74-2742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

LEONARD FRANCIS DAVISON and
WILLIAM ANDREW DAVISON,
DEFENDANTS-APPELLANTS.

OPINION

[September 4, 1975]

Appeal from the United States District Court
District of Idaho

Before: KILKENNY, CHOY and GOODWIN,
Circuit Judges.

KILKENNY, Circuit Judge:

Appellants, all enrolled members of the Coeur d'Alene Indian tribe, appeal their convictions, after a jury trial, of murder in violation of the Major Crimes Act, 18 U.S.C. § 1153, as defined in 18 U.S.C. § 1111.

FACTS AND PROCEEDINGS BELOW

Count I of the indictment charges appellants Antelope and Leonard Davison with the felonious entry of the home of a non-Indian woman, situated within the confines of the Coeur d'Alene Indian Reservation [Indian country] in Idaho, with the intent to commit robbery in violation of 18 U.S.C. § 1153. Count II of the indictment charges the same appellants with robbery of a purse containing money from the woman within the confines of the same reservation, all in violation of 18 U.S.C. §§ 1153 and 2111. Count III of the indictment charges appellants Antelope, Leonard Davison and William Davison, along with non-appellant Seyler, with killing the woman in the perpetration of the robbery alleged in Count II, unlawfully and wilfully and with malice aforethought by beating her, a non-Indian, with their fists and feet, within the exterior boundaries of the aforementioned Indian Reservation, all in violation of 18 U.S.C. §§ 1153 and 1111.

Appellants entered pleas of not guilty. Seyler was granted immunity and testified at trial as a government witness. The jury found Antelope and Leonard Davison guilty on all three counts, including first degree murder on Count III. William Davison was convicted solely of the lesser included offense of second degree murder on Count III.

ISSUE

Appellants' common contention is that the murder provision of 18 U.S.C. § 1153 is unconstitutional as applied to them. They argue that it operated to deprive them of equal protection and due process under the Fifth Amendment through an invidious racially-based discrimination unjustified by a proper governmental objective.

THE STATUTORY FRAMEWORK

Murders committed within "Indian country" fit into and are prosecuted under one of four categories:

(1) The crime of killing an Indian by an Indian is governed by the Major Crimes Act, 18 U.S.C. § 1153.[1] Murder under that section is defined in 18 U.S.C. § 1111,[2] which includes a version of the traditional felony murder definition.

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[1] Section 1153 provides in pertinent part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . , shall be subject to the same laws and pentlties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

[2] Section 1111 provides in pertinent part:

". . . Murder is the unlawful killing of a human being with malice aforethought. *Every murder . . . committed*

(2) The crime of killing of an Indian by a non-Indian is governed by the Federal Enclave Law, 18 U.S.C. § 1152,[3] which also refers to § 1111 for the definition of murder.

(3) The crime of killing a non-Indian by an Indian is also controlled by § 1153, as defined in § 1111. This is, of course, the situation in the case before us.

(4) In obvious contrast to the above, the killing of a non-Indian by a non-Indian in Indian country is a matter for prosecution by the state in which the offense occurred. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *United States* v. *McBratney*, 104 U.S. (14 Otto) 621 (1881); *United States* v. *Cleveland*, 503 F.2d 1067 (CA9 1974). Accordingly, the definition of murder in such a case is determined by reference to the situs state's law.

In 1966 Congress amended § 1153 to define and punish in accordance with *state* law assault with a dangerous weapon, incest, and assault with intent to commit rape. *See* 1966 U.S. Code Cong. & Adm. News 3653. Burglary was already so treated. The other amendment in 1968 made definable and punish-

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in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or *robbery* . . . is murder in the first degree." [Emphasis supplied.]

[3] Section 1152 provides in pertinent part:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

able under state law is the offense of assault resulting in serious bodily injury. However, neither amendment changed the definition of murder, which was and remains subject to federal definition under § 1111.

If, in this case, appellants had been non-Indians they would have been indictable only in the Idaho state courts under the murder definition contained in I.C.A. § 18-4003.[4] This provisions, unlike the federal version in § 1111, contains no felony murder provision, but instead would require for conviction proof of premeditation and deliberation.

THE EQUAL PROTECTION CLAIM

The cornerstone of appellants' challenge is that they are discriminated against by reason of the racially-based disparity of governmental burdens of proof under 18 U.S.C. §§ 1153, 1111, and I.C.A. § 18-4003. Needless to say, it requires less evidence to

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[4] I.C.A. § 18-4003 provides as follows:

". . . All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree."

obtain a first degree murder conviction under the federal definition in § 1111, with the felony murder inclusion, than is needed to obtain a murder conviction under the Idaho statute lacking such a provision. Not requiring proof of the critical *mens rea* element of premeditation and deliberation, the federal prosecution of appellants is far less burdensome than had they been non-Indians subject only to Idaho jurisdiction.

Appellants correctly note that Congress has granted federal courts jurisdiction over the crime of which they are convicted solely on the basis of their race. Their argument, however, is not against the grant of jurisdiction itself, but rather against the accompanying definition of murder. They claim that, at least in their case, the definitional difference under the jurisdictional veil allows the government to accomplish something it would be prohibited from doing through direct statutory means if it were to prosecute both Indians and non-Indians for murders of non-Indians in Indian country.

We here emphasize that the *sole* basis for the disparate treatment of appellants and non-Indians is that of race. Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974); *Johnson* v. *Robison*, 415 U.S. 361, 364 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677, 680 n. 5 (1973); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, if a classification would be invalid under the

Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971), and *Johnson* v. *Robison*, *supra*, 364 n. 4. Racial classifications are inherently suspect, are subject to the "most rigid scrutiny," and bear a far heavier burden of justification than other classifications. *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). They can pass constitutional muster only if they are not invidious or capricious and are reasonably related to a proper governmental objective. *Bolling* v. *Sharpe*, *supra*, at 499, 500.

We have had occasion to review the constitutionality of § 1153 under equal protection and due process challenges in a variety of circumstances, but none involving murder or otherwise in point on appellants' claim. In *Gray* v. *United States*, 394 F.2d 96 (CA9 1967), *cert. denied* 393 U.S. 985 (1968), we employed the traditional doctrine of federal wardship or protection of Indians in upholding as constitutional a disparity in sentencing in rape cases. However, the difference in treatment in *Gray* operated to mitigate the penalty for Indians raping non-Indians and thus inured to the Indians' benefit. This contrasts with the present case in which appellants are put at a distinct *disadvantage* by the statute.

Appellee places great reliance upon *Henry* v. *United States*, 432 F.2d 114 (CA9 1970), *cert. denied* 400

U.S. 1011 (1971), in which we held that although the defendant Indian was erroneously charged under § 1152 for his rape of two non-Indians on an Indian reservation, rather than correctly under § 1153, he was not prejudiced thereby and the error was harmless. More importantly, we rejected in *Henry* an equal protection claim which at least superficially resembles appellants', namely:

> "[i]f, as hypothesized by appellant, one of the four defendants had happened to be a non-Indian, both the victim and the offender would be non-Indians, and the crime of rape would not have been determined by reference to §§ 1152 and 2031 [federal definition of rape] . . . , but by the law of Nevada . . ."

Id. at 118. We dismissed this claim specifically because the law operated to apply identical definitions of rape under either federal or Nevada law, thus creating no real disparity of treatment between Indians and non-Indians charged with rape of non-Indian victims. *Henry* followed the holding of *Mull* v. *United States*, 402 F.2d 571 (CA9 1968), *cert. denied* 393 U.S. 1107 (1969). We there held that when a statute does not subject the Indian defendant to any truly invidious racial discrimination (*i.e.*, when he is not put in a genuinely disadvantageous position), it cannot be challenged on equal protection grounds.[5] Of course, appellants' situation is precisely

[5] *Mull* involved an assault by an Indian agent against an Indian. After stating the above rule, we added:

[Footnote continued on page 9a]

the opposite and serves as a critical point of distinction for our purposes. *Mull*, *Gray* and *Henry* all sustained § 1153 under constitutional challenges, but none of them involved the kind of invidious discrimination which puts an Indian defendant at a serious procedural or substantive disadvantage. Appellants' case is clearly one of first impression.

We believe that the rationale expressed in our recent decision in *United States* v. *Cleveland*, 503 F.2d 1067 (CA9 1974), is here applicable. That case involved two categories of *assaults* in Indian country; Indians against Indians and Indians against non-Indians. Regarding the latter, we said a claim of unconstitutional discrmination due to an alleged discrepancy in burdens of proof for assault must fail because state law (Arizona) would apply equally whether the defendant be Indian or non-Indian.[6] Citing *Henry* v. *United States*, supra, we noted that "[i]n a case involving offenses committed by Indians against non-Indians, similar constitutional arguments

[5] [Continued]

> "We deal here only with this appellant and the offense of which and the statutes under which he was convicted. We express no opinion as to other offenses, or as to the effect of later amendments to the statutes as they relate to an offense committed after their enactment." 402 F.2d at 573.

[6] The final paragraph of 18 U.S.C. § 1153 reads:

> "As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed."

were rejected by this Circuit for similar reasons," *i.e.*, the creation of equal treatment by the 1966 and 1968 amendments to § 1153. 503 F.2d at 1071 n. 4.

However, we there took a different position when faced with an assault by an Indian against an Indian in the Arizona legal context. The employment in Arizona of § 1153 for Indian assault defendants and § 1152 for non-Indian assault defendants was such that "[t]he statutory scheme . . . [made] Indians subject to more severe punishment than . . . non-Indians . . . and *reduce*[*d*] *the prosecutor's burden of proof.*"[7] *Id.* at 1071 n. 5. We concluded there was not a sufficient federal or state interest justifying the distinction, one based solely on race. Accordingly, we held that, in the Arizona context, the assault provision violated the Indian defendants' Fifth Amendment due process and equal protection rights.

We there followed, without citation, the logic of *United States* v. *Boone*, 347 F. Supp. 1031 (D. N.M. 1972), heavily relied upon by appellants. *Boone* held unconstitutional that portion of § 1153 referring to state law the definition and punishment of assault with a dangerous weapon by an Indian. Employing reasoning identical to ours in *Cleveland*, the *Boone* court held that the provision placed the Indian at an unjustified, discriminatory disadvantage since under

[7] Comparing 18 U.S.C. § 113 (c), (d) (non-Indian defendants) with A.R.S. §§ 13-249, 13-245(A)(5), (C) (Indian defendants) on the severity of punishment, and 18 U.S.C. § 113 (c) with A.R.S. § 13-249 (A) on the prosecutorial burden of proof.

New Mexico law the prosecution need not prove intent to do bodily harm, which is a requirement under § 1152 when the defendant is a non-Indian.

Both *Cleveland* and *Boone* involved offenses against Indians, so federal jurisdiction existed regardless of the race of the defendant. Here, of course, the question is complicated by the absence of federal jurisdiction against our comparative group, non-Indians killing non-Indians.[8] Appellee argues that appellants are, in reality, complaining of discriminatory jurisdiction, a matter beyond review. We disagree. In *United States* v. *Cleveland*, *supra*, at 1071, we said:

> "The effect of the 1966 and 1968 amendments to section 1153, subjecting Indians who assault non-Indians to state law was to create *equal treatment* of non-Indians and Indian defendants for this category of offenses, [footnote omitted] *excepting only that the Indians are prosecuted in federal courts and non-Indian defendants are prosecuted in the state courts.*" [Emphasis supplied.]

Murder, at least in the Idaho context, does not incur the equal treatment the Congressional amendments gave to assault, though the separate jurisdictional element is obviously still present.

In effect, the murder provision of § 1153 brings about the same unconstitutional disparity of burdens

[8] We noted in *Cleveland*, *supra*, at 1071.

> "The Indians do not contend that the difference in jurisdiction denies them either due process or equal protection."

of proof condemned in *Cleveland*, except that it does not provide any justification for the discriminatory treatment. The government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage when both Indian and non-Indian defendants are jurisdictionally covered. To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity, employing jurisdiction as an inviolate tool. Congress developed the jurisdictional scheme for crimes committed in Indian country, and in so doing it is clearly subject to the strictures of the Fifth Amendment.

Appellee argues that the established federal wardship of Indians justifies the government's treatment of appellants, thus providing the requisite "proper governmental objective." *Bolling* v. *Sharpe*, *supra*, at 500. True enough, Congress has established for Indians a special protected status under the guardianship of the federal government. *Board of Commissioners of Creek County, Okla.* v. *Seber*, 318 U.S. 705 (1943); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Gray* v. *United States*, *supra*, at 98. Moreover, the grant of national and state citizenship to Indians did not lessen the protection of this guardianship. *In re Carmen's Petition*, 165 F. Supp. 942 (N.D. Cal. 1958), *aff'd sub nom. Dickson* v. *Carmen*, 270 F.2d 809 (CA9 1959), *cert. denied* 361 U.S. 934 (1960). Beyond doubt, as was held in *United States*

v. *Thomas*, 151 U.S. 577, 585 (1894), the federal government has

> ". . . full authority to pass such laws . . . as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations."

Nevertheless, the wardship doctrine remains subject to constitutional limitations in recognition of Indians' inherent rights as citizens. *United States* v. *Klamath & Moadoc Tribes of Indians*, 304 U.S. 119, 123 (1938). The Supreme Court recently spoke of this problem in *Keeble* v. *United States*, 412 U.S. 205, 211-212 (1973), referring to the original purpose of the Major Crimes Act *vis-a-vis* Indian defendants' modern-day constitutional rights:

> "In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others.' 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). *This is emphatically not to say, however, that Congress intended to deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant.*" [Emphasis supplied.][9]

[9] The issue in *Keeble* was whether an Indian prosecuted under § 1153 is entitled to a jury instruction on lesser included offenses. The Court held that an Indian has such a

Thus, it is clear that when Indians are put at a serious racially-based disadvantage, especially—as here—in matters of the criminal rights of defendants, such discriminatory treatment cannot be justified by the wardship concept. The Indians' protected status cannot be employed to make their prosecution for murder easier than that of non-Indians under identical circumstances. Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians.

The argument is also made that the need for uniform federal law within the confines of Indian reservations—some of which traverse state lines—provides the requisite "proper governmental objective" to sustain the statute's constitutionality. We reject this argument. First of all, Congress has already seen fit to make the definition and punishment of certain other crimes under § 1153 wholly dependent upon state law, thus showing a legislative intent to risk possible inconsistency within multi-state reservations in order to secure equal treatment in the prosecution of Indians and non-Indians. Murder was intentionally omitted from this egalitarian scheme. More important, we view a possible legal fortuity based on location to be much less onerous than one based on the inherently suspect classification of race. Consistency in federal criminal law is ordinarily a highly

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constitutionally guaranteed right if the facts of his case so warrant, even though the lesser included offense is not expressly enumerated in the statute.

laudable legislative objective, but not when it operates to deprive citizens of their right to equal treatment. Just as in this wardship argument, *supra*, it is elementary that in the case of such a conflict the Fifth Amendment takes priority.

It is our considered judgment that § 1153's murder provision is unconstitutional as applied in this case. This is due to the nature of Idaho's murder statute which does not contain a felony murder provision. The constitutionality of § 1153, as applied to murders in other states is not before us. Nor do we reach the contention that the felony murder provision of § 1111 is unconstitutional on its face. If the federal-state disparity elsewhere does not result in discriminatory treatment to the Indian defendant (*i.e.*, if they are treated no worse than similarly situated non-Indians), a *Henry*-type situation would exist and they cannot complain.

CONCLUSION

Because appellants were indicted and convicted under a statute unconstitutional in its application to them, their convictions of murder under Count III are reversed. In so disposing of this appeal, we need not consider appellant William Davison's other assignments of error. Since appellants Antelope and Leonard Davison do not challenge their convictions of burglary and robbery under Counts I and II of the indictment, those convictions are affirmed.

Affirmed in part and reversed in part.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-2741

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

GABRIEL FRANCIS ANTELOPE, DEFENDANT-APPELLANT.

No. 74-2742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

LEONARD FRANCIS DAVISON and
WILLIAM ANDREW DAVISON,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Idaho

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Idaho and was duly submitted.

On consideration whereof, it is now ordered and adjudged by this court, that the judgment of the said district court in this cause be, and hereby is affirmed in part and reversed in part.

Filed and entered September 4, 1975.

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